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# Help America Vote Act Enforcement

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# THE LEGISLATION AND POLICY ROUNDTABLE



**ELECTION LAW: LEGISLATION AND CONTROVERSIES**

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## Help America Vote Act Enforcement

Tiana Butcher

Although the Help America Vote Act of 2002 (HAVA) features extensive mandates, its enforcement provisions are weaker than those found in previous federal election reform laws, including the Voting Rights Act and the National Voter Registration Act. Activists argue this limited enforcement power is a failing of the Act.<sup>1</sup> Congress may have chosen to adopt weak enforcement mechanisms due to political posturing, lack of funding, faulty technology, or lobbying by the states. Regardless of the reason behind this choice, stronger enforcement mechanisms in HAVA would, paradoxically, fail to encourage election reform or deter election reform altogether.

### I. Background

It became clear after the 2000 presidential election that many voting systems across the country required technical upgrades. Many states relied on punch card or lever voting systems, which cause the highest number of residual, or uncast, votes.<sup>2</sup> After the highly contested 2000 presidential election, the public began to question the integrity of voting systems across the country. Stories of hanging chads and voter disenfranchisement flooded the news and led to an outcry for election reform.<sup>3</sup> Congress responded by passing the Help America Vote Act of 2002.<sup>4</sup>

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<sup>1</sup> 148 CONG. REC. 20828, 20845 (2002) (letter from La Raza).

<sup>2</sup> Stephen Ansolabehere & Charles Stewart III, *Residual Votes Attributable to Technology*, 67 J. Pol. 365, (2005) available at [http://www.vote.caltech.edu/journals/JOP-StwrtAnsol\\_05.pdf](http://www.vote.caltech.edu/journals/JOP-StwrtAnsol_05.pdf).

<sup>3</sup> David Casstevens, *The Waiting Game Is Almost Over – Maybe*, ARIZONA REPUBLIC, Nov. 15, 2000; Editorial, *Federal, state lawmakers should eliminate ballot confusion*, DALLAS MORNING NEWS, Nov. 15, 2000.

<sup>4</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666.

Congress has the authority under the Constitution to regulate federal elections, including state procedures used to administer them.<sup>5</sup> Congress exercised this authority over the states in election administration on three occasions. The first was the Voting Rights Act of 1965, the second was the National Voter Registration Act of 1993, and the third, and most recent, was the Help America Vote Act of 2002.

Created “to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections,” the Help America Vote Act of 2002 (HAVA) places requirements on the states and offers monetary incentives for states to meet and exceed those requirements.<sup>6</sup> HAVA mandates include meeting system requirements, ensuring accessibility in foreign languages and for individuals with disabilities, establishing a system for processing provisional ballots and developing a computerized statewide voter registration list.<sup>7</sup> HAVA requires all states, regardless of whether they accept Federal funding, to meet these standards.<sup>8</sup>

Section 301 of HAVA sets out the system requirements and mandates that all voting systems allow voters to verify their candidate selection before casting their ballot, provide voters with the opportunity to change the selection before casting their ballot, notify voters when they make multiple selections for the same office and allow voters to correct these over-votes.<sup>9</sup> The error rate of these systems must fall within the standards established by the Federal Election Commission. Where the voting technology does not make this possible, states may meet these

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<sup>5</sup> U.S. CONST. art. I, § 4; U.S. CONST. art. II; U.S. CONST. amend. XII; *Cook v. Gralike*, 531 U.S. 510 (2001). Martin J. Siegel, *Congressional Power Over Presidential Elections: The Constitutionality of the Help America Vote Act under Article II, Section 1*, 28 VT. L. REV. 373 (2004) (arguing that Congress also has the authority to regulate Presidential elections; by default, states often utilize the same system for State and local elections).

<sup>6</sup> Help America Vote Act of 2002, 116 Stat. at 1666.

<sup>7</sup> Help America Vote Act of 2002, §§301-303, 116 Stat. at 1704.

<sup>8</sup> Letter from Ralph F. Boyd, Jr., Assistant Attorney Gen., U.S. Dep’t of Justice Civil Rights Div., to the Honorable Nancy L. Worley, Sec’y of State, Ala. (Mar. 17, 2003) *available at* [http://www.usdoj.gov/crt/voting/hava/states\\_ltr.htm](http://www.usdoj.gov/crt/voting/hava/states_ltr.htm).

<sup>9</sup> Help America Vote Act of 2002, §§ 301-303, 116 Stat. at 1704.

requirements by launching a voter education campaign and giving voters information on how to correct errors before casting their ballot. All systems must create a record for manual audit purposes and each precinct shall have the ability to accommodate individuals with disabilities and certain foreign language speakers. The deadline for compliance with this provision was January 1, 2006.

Paper ballots or punch card ballots may meet HAVA system requirements if the state launches a voter education campaign. Paper and punch card ballots are the most simplistic HAVA-compliant voting systems that remain in use throughout the country. A paper ballot lists the names of candidates on a sheet of paper and the voter makes his or her selection with a pen or pencil.<sup>10</sup> A punch card ballot also includes a printed list of candidates, but the ballot is placed in a machine, which the voter uses to punch a hole next to his or her selection. The machine reads and records the vote based on where the hole appears on the card. Problems arise, however, when the machine fails to punch out the holes completely, creating dimpled, pregnant, or hanging chads, all of which the machine is unable to recognize.<sup>11</sup>

The optical scan paper ballot combines the usability of the paper ballot, allowing the voter to select their choice of candidate on paper, with electronic counting technology. Optical scan ballots and paper ballots have the lowest residual vote rates and are generally considered the most reliable.<sup>12</sup> However, both systems require a great deal of additional time for counting, whether by manually tabulating all results, with the use of paper ballots, or by feeding the optical scan sheets into the reader. With the high level of voter turnout in recent years, election

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<sup>10</sup> Audra L. Wassom, *The Help America Vote Act of 2002 and Selected Issues in Election Law Reform*, 29 T. Marshall L. Rev. 357, 382 (2004).

<sup>11</sup> *Id.*

<sup>12</sup> Ansolabehere, *supra* note 2, at 365.

administrators are looking to electronic voting technology, which offers instantaneous vote tabulation.

The most simplistic form of electronic voting technology is the mechanical lever voting system. Voters make their selection by pressing a lever that corresponds to their preferred candidate's name. The machine advances a counting mechanism when the voter leaves the voting booth.<sup>13</sup> Although it is reliable for Presidential or Gubernatorial races, the residual vote rate for lever technology in races lower on the ticket is the highest among all systems.<sup>14</sup> The Election Assistance Commission found that lever systems fail to meet the acceptable error rate and, therefore, do not meet the requirements of the Help America Vote Act.<sup>15</sup>

Direct Recording Electronic (DRE) machines are the most recent innovation in voting technology. DRE machine design is based on the ATM systems, to which a majority of Americans are accustomed.<sup>16</sup> After the passage of the Help America Vote Act, many states moved to DRE systems. Yet, problems with these DRE systems, such as faulty counting mechanisms, failure to produce audit records, and their susceptibility to vote manipulation, led many states to abandon these systems and revert to paper ballots.<sup>17</sup>

Section 302 of HAVA mandates that all states enable individuals to vote by provisional ballot. Provisional ballots must be available to individuals who claim to have registered but whose names do not appear on the register. This individual must affirm that he or she is a registered voter in the jurisdiction and that he or she is eligible to vote in that election. Once the appropriate election official verifies this affirmation, the provisional ballot will count as a vote in

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<sup>13</sup> Wassom, *supra* note 10, at 382.

<sup>14</sup> Ansolabehere, *supra* note 2, at 365.

<sup>15</sup> Press Release, Election Assistance Commission, Lever Voting Machines and HAVA Section 301(a) (Sept. 8, 2005) *available at* [http://www.eac.gov/election/docs/eac-20advisorylevermachines2005-005.pdf/attachment\\_download/file](http://www.eac.gov/election/docs/eac-20advisorylevermachines2005-005.pdf/attachment_download/file).

<sup>16</sup> Press Release, Massachusetts Institute of Technology, MIT, Caltech join forces to develop reliable, uniform US voting machine (Dec. 14, 2000) *available at* [http://www.vote.caltech.edu/press/MIT\\_12-14-00.pdf](http://www.vote.caltech.edu/press/MIT_12-14-00.pdf).

<sup>17</sup> Deborah Hastings, *States throw out costly electronic voting machines*, ASSOCIATED PRESS, Aug. 19, 2008.

that election. The voters must have the ability to determine whether their provisional ballots counted in the election and, if not, the reason for their exclusion.

Section 302 also mandates that states post voting information at each polling location and follow specific procedures in the event the federal or state courts delay poll closures. States must also post information on voting systems, instructions for mail-in voters, days and times for voting, voting rights, and laws prohibiting fraud and misrepresentation in each polling location. The deadline for compliance with Section 302 of HAVA was January 1, 2004.

Section 303 mandates the creation of a computerized statewide voter registration list and outlines requirements for voters who register to vote by mail. Previously, states maintained voter registration lists at the local level. These local offices generally did not communicate with one another. When registered voters moved and registered to vote in their new location many were not deregistered from their previous location. This gap in electoral procedures allowed voters to register in numerous locations and potentially cast multiple votes during a single election. By requiring the creation of a statewide voter registration list, and requiring integration with other agencies' computer databases within the state, Section 303 tries to eliminate this problem. Section 303 also describes requirements for verifying and maintaining the computerized lists and ensuring their security.

Congress designated funds to help states meet and exceed the requirements enumerated in Sections 301 to 303 of HAVA. Funding is available through three different provisions throughout the Act.<sup>18</sup> Funds appropriated through Sections 101 and 251 are for the general purpose of complying with Title III requirements outlined above. They may also be used for improving election administration, educating voters, election officials, poll workers, and election

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<sup>18</sup> HAVA includes a fourth provision for payments to states that improve access for individuals with disabilities. However, this is administered by the Department of Health and Human Services and is not relevant to this analysis.



volunteers, improving elections systems beyond the requirements of Title III or establishing voter hotlines. However, to receive Section 251 funds, a state must certify that it is compliant with Title III before utilizing these funds to improve the general administration of elections.

States that used punch card or lever voting machines during the 2000 election may also receive Section 102 funds. In order to receive these funds, a state must certify that it will use the payment to replace these punch card or lever voting systems with systems that meet Section 301 requirements. To receive any of these HAVA funds, a state must also commit its own funds, equal to five percent of the total funds allocated to it under HAVA to achieve these reforms.<sup>19</sup>

## II. HAVA Enforcement Mechanisms

To ensure that states comply with HAVA requirements, Congress gave the United States Attorney General the authority to bring civil action against a state or jurisdiction, when necessary, to bring states into compliance with Title III requirements.<sup>20</sup> Likewise, to ensure that states appropriately spend HAVA funds, the Election Assistance Commission has authority to audit each state or jurisdiction.

Section 401 of HAVA gives the Attorney General enforcement authority over the uniform and nondiscriminatory election technology and administration requirements that apply to states under Sections 301, 302, and 303.<sup>21</sup> The Attorney General has delegated this authority to the Department of Justice Civil Rights Division Voting Section.<sup>22</sup> The Department of Justice enforces HAVA through litigation and education campaigns, outlining requirements of the Act,

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<sup>19</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, § 253(b)(5); 116 Stat. 1666, 1694; U.S. Election Assistance Commission, Instructions for Applying for 2008 Requirements Payments, <http://www.eac.gov/election/fy-2008-requirements-payments/instructions-for-applying-for-2008-requirements-payments>.

<sup>20</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, § 401, 116 Stat. 1666, 1715.

<sup>21</sup> Department of Justice Civil Rights Division Voting Section, <http://www.usdoj.gov/crt/voting/hava/hava.html>.

<sup>22</sup> Letter from Ralph F. Boyd, Jr. to Nancy L. Worley, *supra* note 8.

and addressing questions posed by the states.<sup>23</sup> The Department of Justice Civil Rights Voting Division, under its enforcement authority of HAVA, developed a broad election-monitoring program to oversee the administration of elections.<sup>24</sup>

In December of 2003, the Department of Justice outlined its “strategy for effective enforcement of election reform law for 2004” in advance of HAVA deadlines set to take effect on January 1, 2004.<sup>25</sup> According to the release, “[t]o the extent that any covered jurisdiction falls short of full implementation, the Division will work with the jurisdiction to ensure compliance. If such efforts fail, HAVA authorizes the Attorney General to seek any necessary declaratory or injunctive relief.”<sup>26</sup> Through this press release, it is evident that the agency is committed to assisting states become compliant with HAVA through education campaigns and coordinated efforts before resorting to litigation.

HAVA created the Election Assistance Commission, which has the authority to adopt voluntary voting system guidelines, test and certify voting systems, conduct studies, and otherwise promote the effective administration of federal elections. The Election Assistance Commission also serves as the clearinghouse of information on federal election administration requirements and has the authority to audit states’ use of HAVA funds.<sup>27</sup>

The Election Assistance Commission, through its responsibility in managing HAVA funds, also has the responsibility to recover Section 102 funds granted to states that agreed to

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<sup>23</sup> U.S. Department of Justice Civil Rights Division Voting Section, <http://www.usdoj.gov/crt/voting/hava/hava.html>.

<sup>24</sup> GOVERNMENT ACCOUNTABILITY OFFICE, EXECUTIVE OFFICE OF THE PRESIDENT, DOJ ACTIVITIES TO ADDRESS PAST ELECTION-RELATED VOTING IRREGULARITIES (2004) *available at* <http://www.gao.gov/new.items/d041041r.pdf>.

<sup>25</sup> Press Release, U.S. Dep’t of Justice, Justice Department Outlines Strategy for Effective Enforcement of Election Reform Law for 2004 (Dec. 31, 2003).

<sup>26</sup> *Id.*

<sup>27</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, § 202, 116 Stat. 1666, 1673 (2002); Election Assistance Commission, <http://www.eac.gov/about>.

replace punch card and lever voting machines but did not make the transition by the deadline.<sup>28</sup> HAVA granted funds to states through three provisions, Sections 101, 102, and 251. The funds appropriated through Sections 101 and 251 are available to states at any point and the Election Assistance Commission cannot recover those funds simply because the state did not spend the money by a particular deadline. Section 102 funds, however, have to be spent by the states to replace punch card or lever voting machines by a particular date, November 2004, as outlined in HAVA, or later, if granted a waiver by the Election Assistance Commission. If the state did not spend the Section 102 funds by this deadline, the Election Assistance Commission has the authority to recover these funds.<sup>29</sup>

The Election Assistance Commission also has the authority to take action if a state incorrectly spends funds allocated under any provision. If a state did not follow proper procedure when expending HAVA funds for otherwise appropriate purposes, the Election Assistance Commission may require that the state repay its own election fund in the amount spent.<sup>30</sup> The state may still use these recovered funds for election administration purposes. However, if an individual spent HAVA funds inappropriately, such as on speechwriting or travel expenses, the Election Assistance Commission may mandate that the individual repay the U.S. Treasury. Here, the state forfeits the use of those funds for election administration purposes.

In addition to Federal enforcement provisions, states must also create mechanisms to receive and investigate voter complaints under Section 402 of HAVA. For states receiving HAVA funds, these complaint procedures must be “uniform and nondiscriminatory” and the

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<sup>28</sup> Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?*, 29 U. ARK. LITTLE ROCK L. REV. 679, 695 (2007).

<sup>29</sup> Help America Vote Act of 2002, § 102(a)(3)(B), 116 Stat. at 1670.

<sup>30</sup> Gracia Hillman, *Every Vote Counts: Improving the Electoral Process in the 2006 Elections*, TREND LETTER POLITICAL REPORT, Jan.-Feb. 2007, at 9, available at [http://www.eac.gov/about/commissioners/hillman/docs/janfeb2007focushillman.pdf/attachment\\_download/file](http://www.eac.gov/about/commissioners/hillman/docs/janfeb2007focushillman.pdf/attachment_download/file).

state must provide “the appropriate remedy.”<sup>31</sup> If the state fails to meet the deadline for addressing the complaint, the complaint will be resolved through an alternative dispute resolution process. Individuals with grievances may also bring their complaints directly to the Department of Justice.<sup>32</sup> States that do not receive HAVA funds must certify that they provide a similar complaint mechanism.

Despite all of these requirements and enforcement provisions, the media continuously reports on voting technology glitches, lost votes, and voter distrust of voting technology. Congressman Rush Holt stated “confidence in voting systems has only worsened since the passage of HAVA.”<sup>33</sup> Some states will not be compliant with HAVA by the November 2008 elections. The remainder of this paper analyzes which measures Congress may have adopted to strengthen HAVA, potential reasons why these measures were not taken, and how those measures could have influenced the states.

### **III. Enforcement Provisions In Other Election Reform Legislation**

In both the Voting Rights Act and the National Voter Registration Act, Congress utilized strong enforcement mechanisms.<sup>34</sup> The enforcement mechanisms used by Congress in these statutes include providing individuals with a private right of action, assessing monetary penalties for anyone who deprives a person of their voting rights, appointing observers to oversee state actions, requiring Federal courts to pre-clear certain state practices, and weighing criminal penalties and fines to anyone who commits fraud or attempts to intimidate citizens from exercising their rights. For a variety of reasons I shall discuss below, Congress also had the

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<sup>31</sup> Help America Vote Act of 2002, § 402(a), 116 Stat. at 1715.

<sup>32</sup> U.S. Department of Justice Civil Rights Division Overview, What We Do, <http://www.usdoj.gov/crt/crim/overview.php>.

<sup>33</sup> THE PEW CHARITABLE TRUSTS, HAVA AT 5, 19 (2007).

<sup>34</sup> *People v. Ballard*, 104 Cal. Rptr. 81 (Cal. Ct. App. 1980); *Am. Fed’n of State, County & Mun. Employees v. Mich. Civil Serv. Comm’n*, 292 N.W.2d 442 (Mich. 1980).

authority to include strong enforcement mechanisms in HAVA but did not do so. The following section shall discuss potential reasons why Congress did not adopt these mechanisms in HAVA.<sup>35</sup>

### *Voting Rights Act*

Through the Voting Rights Act of 1965 (VRA), Congress implemented strong enforcement mechanisms and gave itself authority over the state administration of elections to prohibit voter disenfranchisement based on race or color.<sup>36</sup> Section 4 of the VRA identifies that its purpose is “[t]o assure that the right of citizens in the United States is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State . . .”<sup>37</sup> This is a direct imposition of federal authority over state elections.

The Supreme Court held, in *Cook v. Gralike*, that federal legislation governing elections preempts state authority.<sup>38</sup> States have the authority to regulate elections on issues for which Congress has not preempted the field.<sup>39</sup> This authority extends to the National Voter Registration Act, the Help America Vote Act and other federal legislation that preempts state election law.

The VRA gives the federal courts broad authority over state election administration. The federal courts have the authority to require that states suspend the use of tests or devices, which deny citizens the right to vote because of their race or color, for as long as the court finds it to be

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<sup>35</sup> 148 CONG. REC. 20638, 20654 (2002) (letter from Common Cause).

<sup>36</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

<sup>37</sup> Voting Rights Act of 1965, § 4(a), 79 Stat. at 438.

<sup>38</sup> *Cook v. Gralike*, 531 U.S. 510 (2001).

<sup>39</sup> *Foster v. Love*, 522 U.S. 67 (1997).

necessary.<sup>40</sup> In any litigation for equitable relief arising under the Voting Rights Act, the Federal court has the authority to retain jurisdiction for as long as it finds appropriate. While the Federal government maintains jurisdiction over these claims, a state may not implement additional voting qualifications or practices without approval of the Federal authorities.<sup>41</sup> Although not discussed in the statute, this also allows an unbiased court to hear the claim against the state.<sup>42</sup>

The Voting Rights Act also gave the United States District Court for the District of Columbia authority to grant “preclearance” of state registration practices. Any state identified by the Attorney General as needing additional supervision is required to seek approval from the Court before enacting or administering any “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . .”<sup>43</sup> Through this measure, the Federal government could prohibit certain practices before disenfranchising any voters.<sup>44</sup>

If the Attorney General institutes a proceeding against a state or jurisdiction, the VRA allows the United States Civil Service Commission to appoint federal examiners to enforce the Fifteenth Amendment.<sup>45</sup> Wherever an examiner is assigned to a state or jurisdiction, the Attorney General also has the ability to request observers who oversee activities at polling locations and during vote tabulation.<sup>46</sup>

In addition to these provisions, the VRA outlines monetary or criminal penalties which may be imposed on anyone who violates another person’s right to vote as identified in the Act, provides false or fraudulent statements to voting officials, or otherwise violates other provisions

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<sup>40</sup> Voting Rights Act of 1965, § 3(b), 79 Stat. at 437.

<sup>41</sup> *Id.*

<sup>42</sup> Voting Rights Act of 1965, §3 (c), 79 Stat. at 437.

<sup>43</sup> Voting Rights Act of 1965, § 5, 79 Stat. at 439.

<sup>44</sup> Wassom, *supra* note 10, at 370.

<sup>45</sup> Voting Rights Act of 1965, § 3(a), 79 Stat. at 437.

<sup>46</sup> Voting Rights Act of 1965, § 8, 79 Stat. at 441.

of the Act.<sup>47</sup> Since the passage of the Voting Rights Act, courts have held that citizens have an implied right of private action in bringing claims for violation of a federal statutory provision which result in a person's right to vote due to race, color or membership in a language minority.<sup>48</sup>

*National Voter Registration Act of 1993*<sup>49</sup>

Congress passed the National Voter Registration Act (NVRA) in 1993 to “increase the number of eligible citizens who register to vote,” “enhance participation of eligible citizens as voters,” “protect the integrity of the electoral process,” and “ensure that accurate and current voter registration rolls are maintained.”<sup>50</sup> The NVRA provisions affect federal elections; however, Congress calls upon State and local governments “to promote the exercise” of a citizen's right to vote.<sup>51</sup> The NVRA requires each state to develop procedures for registering voters when they apply for a motor vehicle driver's license, by mail or in person.<sup>52</sup> A state must also adopt certain requirements for confirming and removing voters on registration lists.<sup>53</sup>

Congress enumerated a variety of civil enforcement measures and criminal penalties for those who fail to meet the requirements of the NVRA.<sup>54</sup> An individual who “knowingly and willfully intimidates, threatens, or coerces, or attempts to intimidate, threaten, or coerce any person” or “knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the

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<sup>47</sup> Voting Rights Act of 1965, §§ 11-12, 79 Stat. at 443.

<sup>48</sup> Update to Voting Rights Act expanded it to include language minorities; this has been adopted in court cases expanding the private right of action to members of language minorities. *See Gray v. Main*, 291 F. Supp. 998 (M.D. Ala. 1966); *Webber v. White*, 422 F. Supp. 416 (N.D. Tex. 1976); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 712 N.Y.S.2d 687 (N.Y. App. Div. 2000).

<sup>49</sup> National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77.

<sup>50</sup> National Voter Registration Act of 1993, § 2(b), 107 Stat. at 77.

<sup>51</sup> National Voter Registration Act of 1993, § 2(a), 107 Stat. at 77.

<sup>52</sup> National Voter Registration Act of 1993, § 4, 107 Stat. at 78.

<sup>53</sup> National Voter Registration Act of 1993, § 8(c), 107 Stat. at 82.

<sup>54</sup> National Voter Registration Act of 1993, §§ 11-12, 107 Stat. at 88.

residents of a state of a fair and impartially conducted election process” will be subject to fines or five years of imprisonment.<sup>55</sup>

Congress also explicitly provided a private right of action for any person “who is aggrieved by a violation of this Act.”<sup>56</sup> The only prerequisite for bringing a claim is that the individual notify the chief election official from the state of the alleged violation. If the official fails to correct the violation within ninety days, the individual may bring an action against the state in federal district court.<sup>57</sup> This ninety-day correction period may vary depending on when the violation occurred.<sup>58</sup> The NVRA also allows the prevailing party to recover attorneys’ fees,<sup>59</sup> which greatly increases public access to the courts.

#### *HAVA and Enforcement Mechanisms of the VRA and the NVRA*

Congress has the authority to preempt state election law and, thus, had the authority to impose any measures necessary to enforce Federal election laws. Congress allowed for enforcement of the provisions of the VRA and the NVRA by assessing monetary penalties for anyone who deprives a person of his or her rights under the act, appointing observers to oversee state actions, requiring Federal courts to pre-clear certain state practices, giving citizens a private right of action, and weighing criminal penalties and fines to anyone who commits fraud or attempts to intimidate citizens from exercising their rights.

HAVA does adopt some of the prior enforcement mechanisms. Like the VRA or the NVRA, HAVA also allows criminal penalties and fines to be levied on anyone who commits

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<sup>55</sup> National Voter Registration Act of 1993, § 12, 107 Stat. at 88.

<sup>56</sup> National Voter Registration Act of 1993, § 11(b), 107 Stat. at 88.

<sup>57</sup> National Voter Registration Act of 1993, § 11(b)(2), 107 Stat. at 88.

<sup>58</sup> National Voter Registration Act of 1993, § 11(b)(2)-(3), 107 Stat. at 88.

<sup>59</sup> National Voter Registration Act of 1993, § 11(c), 107 Stat. at 88.



fraud or attempts to intimidate citizens.<sup>60</sup> Although not explicitly included in HAVA, the Department of Justice, through its enforcement power, appoints observers to conduct election monitoring.<sup>61</sup> HAVA also gives the Election Assistance Commission authority to pre-clear a state's proposed election system reforms, a parallel to the preclearance requirement in the VRA. States that chose to accept HAVA funds had to submit a plan describing how it would use and oversee the use of payments and reform its voting system to the Election Assistance Commission.<sup>62</sup> The Election Assistance Commission would then publish the plan in the Federal Register for public notice and comment.<sup>63</sup> Unlike the VRA or the NVRA, Congress did not explicitly give citizens an explicit private right of action or impose monetary penalties on any entity that deprives an individual of their right to vote.

Because Congress did not provide for an explicit private right of action, it is the responsibility of the Department of Justice to bring claims against states for failure to meet HAVA requirements. It is possible that the courts will find an implied private right of action in HAVA through 42 U.S.C.A §1983, allowing civil actions for the deprivation of rights.<sup>64</sup> Under this statute, a petitioner must show that someone acting under the color of law deprived him or her of a Constitutional Right.<sup>65</sup> Currently, only the District Court for the Eastern District of Michigan found, in *Bay County Democratic Party v. Land*, that a private right of action exists through 42 U.S.C.A. §1983. This Court found that provisional voting rights, granted through HAVA, met this standard.<sup>66</sup> The Court made this determination by applying a three-part test

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<sup>60</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, § 905, 116 Stat. 1666, 1729.

<sup>61</sup> GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 24.

<sup>62</sup> Help America Vote Act of 2002, § 254, 116 Stat. at 1694.

<sup>63</sup> Help America Vote Act of 2002, § 255, 116 Stat. at 1697.

<sup>64</sup> 42 U.S.C.A. §1983 (2008).

<sup>65</sup> *Id.*

<sup>66</sup> *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 424-27, 438 (E.D. Mich. 2004).

from *Wright v. Roanoke Redevelopment and Housing Authority*.<sup>67</sup> This test considered whether the provision was intended to benefit the plaintiff, whether the provision created a binding obligation on the government, and lastly, whether the plaintiff's interest is specific enough to be enforced.<sup>68</sup> No other court has adopted this point of view.

In certain cases, courts may find that an individual has standing through the private right of action that already exists through the VRA or the NVRA. If the court is to find a private right of action through the VRA for a state's action, or failure to act, under HAVA, the individual would need to show that the state's action had the effect of depriving him or her of the right to vote or otherwise diluting his or her vote based on his or her identity as a racial or language-speaking minority. In *Crawford v. Marion County Election Board*, the Supreme Court was not willing to find an equal protection argument where one group was disproportionately affected by election practices adopted without discriminatory intent. The Supreme Court opinion in *Crawford v. Marion County Election Board* stated:

Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment . . . weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. The Fourteenth Amendment does not regard neutral laws as invidious ones, *even when their burdens purportedly fall disproportionately on a protected class*. *A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected [emphasis in original].<sup>69</sup>

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<sup>67</sup> *Id.* at 425 (referencing *Wright v. Roanoke Redevelopment and Hous. Auth.*, 429 U.S. 418, 423 (1987)).

<sup>68</sup> *Id.* at 424-27, 438.

<sup>69</sup> *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

In light of this precedent, it is unlikely that courts will find a claim under the Voting Rights Act's private right of action for cases which arise under changes to election administration due to HAVA.

Alternatively, to invoke the private right of action under the NVRA, the complaint would need to involve a voter registration issue and the complainant would need to first bring a grievance to the state. HAVA requires that states adopt grievance procedures and imposes a ninety day time limit for the resolution of complaints. This is the same time limit imposed under the NVRA. However, HAVA explicitly states that the complaint shall be subject to alternative dispute resolution if the grievance procedures fail to resolve the complaint within that time limit. This does not leave room for the court to recognize a private right of action for HAVA complaints.

In cases brought against states by private citizens since the passage of HAVA, the Department of Justice argues that a private right of action does not exist.<sup>70</sup> Courts also recognize that HAVA does not itself provide for a private right of action.<sup>71</sup> One exception, however, is in *Bay County Democratic Party v. Land*, where the court found that a private right of action does exist on provisional ballot issues.<sup>72</sup>

#### IV. Potential Reasons for Weak Enforcement Provisions in HAVA

Given the weighty enforcement mechanisms and penalties established through the Voting Rights Act and the National Voter Registration Act, it is interesting that Congress chose to adopt relatively weak enforcement mechanisms in HAVA. There are a variety of potential reasons

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<sup>70</sup> U.S. Department of Justice Civil Rights Division Voting Section *supra* note 23.

<sup>71</sup> See *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572 (6th Cir. 2004); *Paralyzed Veterans of Am. v. McPherson*, No. C 06-4670, 2006 WL 3462780, at \*6 (N.D. Cal. Nov. 28, 2006); *Taylor v. Onorato*, 428 F. Supp. 2d 384, 386 (W.D. Pa. 2006).

<sup>72</sup> *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 425 (E.D. Mich. 2004).

why Congress passed HAVA with weak enforcement mechanisms, such as partisan debate over the purpose of the legislation, an inability to fully fund the mandate, technological uncertainty, and active lobbying by the states.

Government officials are partisan creatures. Many were elected into office based on their affiliation with a political party. It cannot be ignored that the individuals who create and implement election law also have a political interest in the outcome. Their success or the success of their party in elections may depend upon the way these laws are interpreted and implemented.

Democrats and Republicans have conflicting ideas about what HAVA reforms are supposed to accomplish.<sup>73</sup> The conservative argument in the election reform debate is that the primary concern is voter fraud. From this perspective, the best way to deter fraudulent voter registration is to set strict registration requirements. The liberal argument in the election reform debate is that voters are disenfranchised by these requirements. From this perspective, registration should become less restrictive. It is difficult to enforce legislation from these conflicting perspectives.

Concern over these conflicting interpretations arose before the passage of HAVA. Specifically, Senator John McCain stated, “I would urge my colleagues not to treat this legislation as the conclusion of our work on the issue of election reform. The Congress must ensure that this legislation is implemented fairly and effectively . . . While I applaud the goal of eliminating instances of fraud, it is important that these provisions be implemented equitably to prevent the disenfranchisement of minority or disabled voters.”<sup>74</sup>

Prior to passage of the Help America Vote Act, members of Congress expressed concern that funding would be insufficient to support these reforms. Failure to fund such broad mandates

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<sup>73</sup> Jim Harper, *Voter ID: A Tempest in a Teapot that Could Burn Us All*, CATO INST., Jan. 7, 2008, <http://www.cato.org/tech/tk/080107-tk.html>.

<sup>74</sup> 148 CONG. REC. 20828, 20842 (2002).

would leave the states with the responsibility of making up for this shortfall.<sup>75</sup> In the first few years since passage, this concern became a reality. Commissioners and staff of the Election Assistance Commission had difficulty meeting initial requirements of HAVA, which they blamed on a lack of funding.<sup>76</sup> In the first year of HAVA implementation, Congress was unable to appropriate the funds initially promised.<sup>77</sup> It is likely that Congress chose to offer incentives for change through HAVA because enforcing mandatory change would be too costly.<sup>78</sup>

Concerns over the reliability of new voter technology may have been another reason why Congress did not impose stricter enforcement measures. Congressman Peter King proposed an amendment to HAVA in 2003, which would have given states a waiver from compliance with HAVA until Congress fully funded the program and became certain that technology was available which could meet, preferred standards.<sup>79</sup> Congressman King stated, “[t]he Help America Vote Act was motivated by electoral integrity – we must insure that the DRE machines meet that goal before spending millions of dollars on them and requiring states to use them in every precinct. At a cost of \$4,000 to 5,000 per DRE, we can’t afford to be wrong.”<sup>80</sup>

The lobbying efforts of State and local government groups may have also led to the relatively weak enforcement provisions of HAVA. As expressed in a letter from the National Association of State Election Directors to Congressmen Bob Ney & Steny Hoyer, “[a]s administrators of elections in each state we express our appreciation to you and your staff for providing us access to the process and reaching out to seek our views and positions on how to

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<sup>75</sup> 149 CONG. REC. 25577, 25618 (2003); 149 CONG. REC. 21145, 21186 (2003).

<sup>76</sup> THE PEW CHARITABLE TRUSTS, *supra* note 33, at 5.

<sup>77</sup> *Id.*

<sup>78</sup> Wassom, *supra* note 10, at 361; National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process, 22 (Aug. 2001)).

<sup>79</sup> 149 CONG. REC. 21145, 21163 (2003).

<sup>80</sup> *Id.*

efficiently and effectively administer elections.”<sup>81</sup> State officials perceived HAVA to be an unwelcome preemption of state authority.<sup>82</sup> State officials also expressed their concern about receiving an unfunded mandate.<sup>83</sup> Numerous organizations, including the National Governors Association, U.S. Conference of Mayors, National Conference of State Legislatures, and the National Association of Secretaries of State were involved in the creation of HAVA.<sup>84</sup> A letter by the National Council of State Legislatures, dated October 7, 2002, provides evidence of the role that state agencies played in the creation of HAVA:

The conference agreement announced today will provide an effective means for states and counties to update their election processes without Federalizing election administration. NCSL worked closely with the conferees in the development of this legislation and is satisfied that it keeps election administration at the state and local level, limits the role of the U.S. Justice Department to enforcement, does not create a Federal private right of action, and establishes an advisory commission that will include two state legislators to assist with implementation.<sup>85</sup>

With such active involvement by state interest groups, which have easy access to local constituents, it is easy to see how HAVA finally passed with relatively weak enforcement provisions.

## V. Impact on the States

Although there are a variety of potential reasons why Congress chose not to adopt strict enforcement mechanisms, it is worth considering the impact of this decision on the states. Many concerns anticipated by Congress have become real impediments to HAVA compliance. If Congress placed stricter enforcement provisions in HAVA, states would be left with the burden

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<sup>81</sup> 148 CONG. REC. 20638, 20655 (2002).

<sup>82</sup> National Conference of State Legislatures, Preemption Monitor, [http://www.ncsl.org/standcomm/sclaw/PreemptionMonitor\\_Index.htm](http://www.ncsl.org/standcomm/sclaw/PreemptionMonitor_Index.htm).

<sup>83</sup> 148 CONG. REC. 20638, 20654 (2002) (letter from NCSL).

<sup>84</sup> THE PEW CHARITABLE TRUSTS, *supra* note 33, at 19.

<sup>85</sup> 149 CONG. REC. 20215, 20317 (2002) (letter from NCSL).

to make up for a budget shortfall to meet ambiguous mandates, while paying for an increase in litigation and penalties levied for inadvertently depriving citizens of their right to vote.

### *Conflicting Interpretation*

Conflicts over the different interpretations of HAVA's mandate have directly affected state implementation. For example, Democratic Governor Janet Napolitano vetoed an Arizona State bill requiring voters to show identification before casting a provisional ballot in 2005.<sup>86</sup> Her justification for vetoing the bill was that it conflicted with HAVA by further restricting voter access to the polls. The Department of Justice under a Republican administration disagreed, arguing that HAVA forms a baseline from which states are able to adopt stricter mechanisms.<sup>87</sup> Looking at the language, it is easy to see how such divergent interpretations are possible regarding HAVA's provisional voting section. The language states that

[i]f an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot . . .<sup>88</sup>

The heart of this argument lies in the interpretation of the phrase "declares that such individual is a registered voter in the jurisdiction." If the person merely making a declaration that they registered to vote even though their name does not appear on the list, it is within the state's discretion whether to require identification before issuing a provisional ballot. This is a classic measure, which, conservatives argue, deters fraud in the voting process.

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<sup>86</sup> Equal Vote, Not Your Father's Justice Department, <http://moritzlaw.osu.edu/blogs/tokaji/2005/04/not-your-fathers-justice-department.html> (Apr. 20, 2005).

<sup>87</sup> Letter from Sheldon T. Bradshaw, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Janice K. Brewer, Secretary of State, Ariz., (Apr. 15, 2005) *available at* [http://www.azsos.gov/releases/2005/pressrelease10/DOJ\\_Opinion\\_on\\_PROP200.pdf](http://www.azsos.gov/releases/2005/pressrelease10/DOJ_Opinion_on_PROP200.pdf).

<sup>88</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, § 302(a), 116 Stat. 1666, 1706.

An alternative way to view the provision is by asking whether the person is making a declaration as to his or her identity while affirming that he or she registered to vote. If so, requiring this person to show identification defeats the purpose of allowing that person to declare their identity. Liberals argue that requiring an individual to show identification places an unnecessary restriction on an individual's right to vote. Both arguments are supported by a well-reasoned justification.<sup>89</sup>

Conflicting interpretations of HAVA have created an opportunity for groups to use litigation as a political tool. As described in an election law publication from Ohio State University Moritz College of Law, "[l]itigation is more likely in swing states with a large number of electoral votes, and in states that have the most restrictive kinds of regulations."<sup>90</sup> If HAVA allowed for a private right of action, the State would have no means to limit this litigation. States would need to divert resources from improving election administration to pay for litigation.

### *Technological & Financial Issues*

To meet HAVA requirements, many states invested in new electronic voting systems, which have since experienced numerous technological glitches and sparked concerns over their susceptibility to fraud. After investing in this expensive new technology, many states are finding the need to purchase paper ballots to ensure the integrity of upcoming elections, which may lead to long lines at the polls, insufficient ballot availability, overextended poll workers, and potential voter disenfranchisement.

One of the leading manufacturers of DRE voting systems, Premier Election Solutions, formerly Diebold, recently admitted to flaws in machines distributed to 1,750 jurisdictions

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<sup>89</sup> Equal Vote, *supra* note 86; Letter from Sheldon T. Bradshaw to Janice K. Brewer, *supra* note 87.

<sup>90</sup> Posting of Nathan Cemenska to Election Law @ Moritz Blog, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=463> (July 15, 2008).



throughout the country. A news article describing this admission indicated that “[o]ther evidence suggests the company may have defrauded testers, and a collection of 13,000 internal e-mails obtained in 2003 details hundreds of glitches since 1998.”<sup>91</sup> In addition to technological glitches, many officials blame problems with new voting technology on poll-worker and voter inexperience with the new systems.<sup>92</sup>

Congress appropriated more than \$3 billion to states through HAVA. States that accepted these funds had to commit five percent in matching funds for the purchase of new voting systems.<sup>93</sup> This was supposed to be an investment in machines that would reduce the rate of errors and the potential for tampering. But once states realized the potential impact of glitches, such as those disclosed by Premier Election Solutions, many opted to sell or abandon their DRE machines and revert to paper ballot systems. As reported by the Associated Press, “states including California, Ohio and Florida abruptly ordered election officials to mothball their electronic machines. Over the last two years, the percentage of registered voters relying on touch-screen technology dropped from 44 percent to 36 percent. In November . . . an estimated 57 percent of voters will rely on paper ballots.”<sup>94</sup>

Returning to paper ballots or optical scan ballots, which are generally reliable, may seem like a simple solution, but it adds a variety of additional complications to election administration. As reported by the Associated Press, “[d]uring this year’s primary season, record numbers of voters showed up. That caused ballots to run out, which delayed the often-cumbersome task of

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<sup>91</sup> David Rosenfield, *E-Vote Vendor Admits Decade of Flaws*, MILLER-MCCUNE, Aug. 29, 2008 available at <http://www.miller-mccune.com/article/646>.

<sup>92</sup> THE PEW CHARITABLE TRUSTS, HAVA AT 5 *supra* note 33, at 13 (2007) (citing THE PEW CHARITABLE TRUSTS, ELECTION REFORM SINCE 2001: WHAT’S CHANGED, WHAT HASN’T AND WHY, (2002)).

<sup>93</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, § 253(b)(5); 116 Stat. 1666, 1694; U.S. Election Assistance Commission, Instructions for Applying for 2008 Requirements Payments, <http://www.eac.gov/election/fy-2008-requirements-payments/instructions-for-applying-for-2008-requirements-payments>.

<sup>94</sup> Hastings, *supra* note 17.

feeding paper ballots into scanning machines. Changing to paper also meant that local election districts had to spend extra money on printing costs.”<sup>95</sup>

After spending money to purchase new electronic voting equipment to meet HAVA requirements, many states, which already faced budget shortfalls, now must purchase paper ballots for the November 2008 election. “Through 2007 election officials from some states have told [the Election Assistance Commission vice chair] that they have spent all their HAVA funding and are scrambling to find alternative sources to pay for the changes they need to comply with Federal law.”<sup>96</sup>

Florida is one state that invested in a variety of new voting systems since the 2000 election, but has suffered from persistent voting system problems. Certain counties in Florida replaced punch card systems with optical scan and DRE systems even before the passage of HAVA. Unfortunately, it did not solve the state’s voting system problems. During the 2002 primaries, “Broward and Miami-Dade counties, two of the state’s most populous, were plagued with machine problems from the moment the polls opened . . . until closing. The meltdown was largely pinned on poll-worker inexperience with the new technology, but poor training and machine glitches played a part.”<sup>97</sup> More recently, DRE machines in Sarasota, Florida malfunctioned and “whatever the cause of the vast numbers of under-votes in the 13<sup>th</sup> district, the event was disturbing enough to compel Florida Gov. Charlie Crist (R) to do away with electronic voting with exceptions for systems for people with disabilities.” Every county in Florida will use an optical scan system by 2008.<sup>98</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> Joan Lowy, *Some states slow to spend voting aid*, USA TODAY, Aug. 1, 2007 available at [http://www.usatoday.com/news/topstories/2007-07-31-231736694\\_x.htm](http://www.usatoday.com/news/topstories/2007-07-31-231736694_x.htm)).

<sup>97</sup> THE PEW CHARITABLE TRUSTS, *supra* note 33, at 13.

<sup>98</sup> *Id.* at 18.

Between allocating funds equal to five percent of HAVA payments to pay for initial voting system reforms, meeting the cost demands of purchasing new voting equipment or printing paper ballots when those initial voting systems failed, and responding to litigation, the cost of HAVA compliance for states has been extensive. States may not use HAVA funds to pay for litigation.<sup>99</sup> If HAVA imposed monetary penalties on states that fail to meet HAVA requirements, the burden on states would be overwhelming.

### *Effective Role of Election Authorities*

States have a political incentive to adopt election systems that meet the highest standards. No state official wants his or her government to be responsible for an election debacle. Due to this political incentive, the most effective way for the Federal government to ensure that states adopt the most secure and reliable voting technology is by working directly with states.

The Election Assistance Commission's only enforcement power is through auditing and recovering funds. However, it also has the authority to provide technical assistance to states and to ensure processes and procedures meet HAVA and other Federal standards.<sup>100</sup> The Election Assistance Commission is responsible for, among other things, adopting voluntary guidelines, testing and certifying system software, conducting studies on effective election administration, and serving as the main clearinghouse of information on elections.<sup>101</sup>

The Department of Justice Civil Rights Division Voting Section (DOJ) also works with states on meeting mandates before taking enforcement action. As described in a letter to Legal Counsel for the Office of the Governor in Michigan, "[y]our letter also raises a question

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<sup>99</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, § 251(f)(1), 116 Stat. 1666, 1692.

<sup>100</sup> UNITED STATES ELECTION ASSISTANCE COMMISSION, STATE GOVERNMENTS' USE OF HELP AMERICA VOTE ACT FUNDS 2007, 29 (2007).

<sup>101</sup> Help America Vote Act of 2002, § 202, 116 Stat. at 1673.

regarding whether the Civil Rights Division has undertaken enforcement activity against states and jurisdictions regarding the Title III requirements. The division is working informally with a number of states regarding certain concerns we have about their implementation of Title III requirements. The Division has also recently filed a formal enforcement action against San Benito County, California concerning certain of the Title III requirements.”<sup>102</sup>

By working with states on meeting HAVA requirements before bringing enforcement actions, the Federal agencies have the opportunity to determine whether the state has merely suffered setbacks in implementation or whether the state has simply failed to implement HAVA mandates. If the state suffered setbacks, such as by purchasing faulty equipment that does not meet the HAVA error rate requirement as promised, the DOJ and the Election Assistance Commission have the opportunity to provide that state with the necessary information and fund management resources before taking enforcement actions. This allows states to spend resources where necessary.

### *A Comparison of Election Reforms in New York and Ohio*

The argument that strong enforcement mechanisms in HAVA would fail to encourage election system reform is best articulated by comparing the relative experiences of New York and Ohio in implementing the voting system requirements of HAVA. New York has failed to implement changes necessary to meet HAVA mandates, whereas Ohio adopted voting system reforms almost immediately.<sup>103</sup> However, New York currently has the more reliable voting system and available funds to spend on upgrading technology when systems that meet its standards become available.

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<sup>102</sup> Letter from Hans A. von Spakovsky, Counsel to the Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., to Kelly Keenan, Legal Counsel, Office of the Governor, Mich., (July 26, 2004).

<sup>103</sup> THE PEW CHARITABLE TRUSTS, ELECTION PREVIEW 2006 (2006).

During the 2000 election, New York used lever voting systems statewide, making it eligible to receive Section 102 funds under HAVA. New York collected HAVA funds and deposited them into its election account, where these funds sat and accrued interest, while other states scrambled to replace HAVA-compliant systems after technology glitches became apparent.<sup>104</sup>

It is unlikely that imposing a monetary penalty would have inspired New York to meet HAVA requirements. Under its enforcement authority, the Election Assistance Commission may recover approximately \$50 million in Section 102 funds unspent by New York. This has not inspired the State to replace its lever systems by the September 2008 deadline, a final date reached after receiving numerous waivers from the Election Assistance Commission.<sup>105</sup> As of December 2007, New York had not expended any of its Section 102 funds, even though it was granted the second highest allocation of Section 102 funds in the country. If HAVA included an enforcement provision which required New York to pay a monetary penalty for failing to meet HAVA provisions, this amount would likely be insignificant when compared to the interest earned by New York on the HAVA funds currently in its election account. Even if the Election Assistance Commission recovers funds that it allocated to New York under Section 102, New York may keep the interest earned on these funds. As of 2007, New York accrued approximately \$8 million in interest.<sup>106</sup>

If Congress included a private right of action in HAVA, it is unlikely that many cases would center on New York's failure to implement voting system requirements for two main reasons. First, the high error rate of lever voting machines is generally a result of its residual

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<sup>104</sup> THE PEW CHARITABLE TRUSTS, *supra* note 33, at 10.

<sup>105</sup> UNITED STATES ELECTION ASSISTANCE COMMISSION, *supra* note 100, at 14.

<sup>106</sup> UNITED STATES ELECTION ASSISTANCE COMMISSION, *supra* note 100, at 13-14.

vote rate in elections lower on the ballot.<sup>107</sup> These are often state and local elections, meaning that the error rate in federal elections may meet the error rate established by HAVA. As a result, individuals would not have standing to bring a private action because they would not be denied the right to vote in Federal elections or have had their vote diluted by using lever voting technology.<sup>108</sup>

Second, New York has used lever voting technology since the 1920s.<sup>109</sup> Voters and poll workers are used to the technology. Many of the problems resulting from the adoption of new technology are the result of human error, both by voters and poll workers, who are unfamiliar with the new systems.<sup>110</sup> These heighten the profile of a state's voting problems and make more citizens and voting groups aware that their votes may be discounted or diluted.

If citizens or activist groups were concerned about New York's delay in implementing HAVA requirements, they would have likely sued, despite an express private right of action in the text of HAVA. However, the only suit pending against New York is an enforcement action by the Department of Justice for failing to meet HAVA requirements to create a statewide voter registration database, and to provide accessible voting systems and systems that notify voters of over-votes and allow voters to correct this error.<sup>111</sup>

New York also lacks the political incentive to change its voting system. Democrats generally win Federal elections by a significant margin over Republicans in New York.<sup>112</sup> If it is likely that one party will win the election by a margin that exceeds the error rate of the lever technology, the technology will not compromise the election result. The New York Government

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<sup>107</sup> Ansolabehere, *supra* note 2, at 365.

<sup>108</sup> 25 Am. Jur. 2d *Elections* § 136 (2004).

<sup>109</sup> Smithsonian National Museum of American History, Vote: The Machinery of Democracy, <http://americanhistory.si.edu/vote/votingmachine.html>.

<sup>110</sup> THE PEW CHARITABLE TRUSTS, *supra* note 33, at 13.

<sup>111</sup> THE PEW CHARITABLE TRUSTS, *supra* note 33, at 7.

<sup>112</sup> 270 to Win: New York, [http://www.270towin.com/states/New\\_York](http://www.270towin.com/states/New_York).

likely is not concerned about affecting the outcome of Federal elections and thus has no political incentive to change its systems.

On the other hand, Ohio is a political “battleground” state, where both Democrats and Republicans have an opportunity to win a majority in the upcoming election. As a result, Ohio is under a great deal of pressure to adopt the most secure and reliable voting system available. HAVA enforcement mechanisms could not provide any added incentive to encourage Ohio to adopt HAVA-compliant voting systems. As expressed by Ohio Secretary of State Jennifer Brunner, “[w]ith Ohio’s historical role in presidential elections and the 2008 presidential election fast approaching, the integrity of the State’s voting process is of paramount importance. Ohio’s voting system must be reliable and accurate to ensure fair results and voter confidence.”<sup>113</sup>

As Ohio is a battleground state during the upcoming election, debates over the purpose of HAVA provisions are likely to result in litigation in Ohio. Where results are likely to be close, that theoretical fight over whether HAVA is supposed to prevent fraud or protect against disenfranchisement has a real impact on which voters go to the polls. When political parties are fighting to win with a small margin, litigation becomes a political tool. As expressed in the Slate newspaper, “Ohio, too, is very close. Democrats hope to take advantage of a new Ohio law that provides a five-day window in late September and early October for residents to register to vote and to vote absentee at the same time. Republicans say the practice encourages voter fraud.”<sup>114</sup>

Ohio faced other issues not covered under HAVA mandates. Ohio allowed local governments to select and purchase voting systems rather than adopt one voting system statewide, like the lever systems in New York. The Conyers Report determined that “there was a wide discrepancy between the availability of voting machines in heavily minority, Democratic

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<sup>113</sup> OHIO SECRETARY OF STATE, JENNIFER L. BRUNNER, EVALUATION AND VALIDATION OF ELECTION RELATED EQUIPMENT, STANDARDS AND TESTING (EVEREST), 74 (2007).

<sup>114</sup> Richard L. Hasen, *The Ground Game*, SLATE, Sept. 8, 2008.

and urban areas as compared to heavily Republican, suburban and exurban areas.”<sup>115</sup> This led to many equal protection arguments by voters and advocacy groups within the State, and inspired significant litigation under the VRA.

Despite Ohio’s efforts to meet HAVA requirements by adopting DRE voting systems statewide, the State has faced numerous voting system complications. Recently, the State commissioned the Evaluation and Validation of Election-Related Equipment, Standards & Testing (EVEREST) report, paid for with Federal funds, which “is a comprehensive review of voting systems revealing startling findings on voting machines and systems used in Ohio and throughout the country.”<sup>116</sup> The study found that the State’s three voting systems—Election Systems & Software (ES&S), Hart Intercivic, and Premier Election Solutions (formerly Diebold)—“do not meet computer industry security standards and are susceptible to breaches of security that may jeopardize the integrity of the voting process.”<sup>117</sup> Although HAVA does not require these safeguards, Ohio Secretary of State Brunner expressed serious concern that failing to provide these safeguards brings the integrity of voting systems adopted nationwide into question.<sup>118</sup>

## Conclusion

As states continue to face complications meeting Help America Vote Act mandates, it is easy to blame HAVA’s weak enforcement mechanisms for not forcing states into compliance. Some enforcement mechanisms in other election reform legislation included monetary penalties and a private right of action. However, adding these enforcement mechanisms to HAVA would

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<sup>115</sup> Steven Ramirez & Aliza Organick, *Taking Voting Rights Seriously: Race and the Integrity of Democracy in America*, 27 N. Ill. U. L. Rev. 427, 435, (2007) (citing WHAT WENT WRONG IN OHIO: THE CONYERS REPORT ON THE 2004 PRESIDENTIAL ELECTION (Anita Miller ed., 2005)).

<sup>116</sup> OHIO SECRETARY OF STATE, JENNIFER L. BRUNNER, *supra* note 113, at 74.

<sup>117</sup> OHIO SECRETARY OF STATE, JENNIFER L. BRUNNER, *supra* note 113, at 74.

<sup>118</sup> *Id.*



either subtract resources and attention from meeting election system standards or have no affect on a state's compliance when that state otherwise lacks political incentive to meet these standards. 